County of Santa Clara

Office of the District Attorney

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Dolores A. Carr
District Attorney

December 4, 2007

Dear Members of the Sunshine Reform Task Force:

This is in response to your request that the District Attorney's Office provide you with a writing setting forth our concerns about the current police records proposal.

I begin by reviewing our involvement in the SRTF process thus far. We first alerted you to our concerns in February 2007 through our position paper and my participation in the panel discussion. We believe that making you aware of these concerns might help clarify aspects of the criminal justice system, police records and California law before you voted on a specific proposal.

Next, in August 2007, once you resumed dealing with the police records provisions, I asked to make a presentation to the public records subcommittee. Unfortunately, we were generally limited to brief public comment and answering an occasional question of a subcommittee member.

I then approached the full SRTF. On October 4, 2007, I urged the task force to delay voting on approval of any portion of the police records proposal until you heard further from us. Nevertheless, the task force unanimously approved the police records motion before it. After the meeting, I spoke with Chair Ed Rast and asked to be placed on the agenda to make a presentation to the full task force. Although he assured me that our input would be welcomed, our presentation was not on the November 1, 2007 agenda.

Next, I sent an email to each task force member, repeating my request to make a presentation. Although the task force discussed my request at length at the November 1, 2007 meeting, it was ultimately denied. You then asked me to prepare this writing for Ed Davis' review. Although I urged you to delay a vote until you had an opportunity to review our concerns, you unanimously voted to approve the police records proposal.

I have also communicated with Mr. Davis who has asked me to address additional issues, discussed below.

Accordingly, below is a summary of our legal views. First, we discuss some misstatements made by others that may have influenced task force opinion, including misunderstandings about the law of California and other states. Second, we analyze how the proposed ordinance violates the California Constitution home rule doctrine and is preempted by state law. Third, we discuss an area we believe is self-evident: the proposed ordinance sharply violates personal privacy rights guaranteed by the California Constitution. Finally, we address the questions of Mr. Davis.[1]

LEGAL AND FACTUAL MISUNDERSTANDINGS MAY HAVE INFLUENCED THE TASK FORCE'S DECISIONS

Our criminal justice system is complicated and it is common that people who lack expertise in the area may have misapprehensions about it. Statements made at some public meetings suggest that this may have occurred and influenced task force decisions. For example, one task force member mistakenly thought that most aspects of police investigatory files become public during a trial. Another member suggested that she favored the subcommittee's proposals because she would have used access to police records in a hiring decision. Yet another task force member remarked that the subcommittee's recommendations on police investigatory records were "much more cautious than other ordinances we've read." He also found it odd that many "resisting arrest" charges do not involve an arrest on an underlying charge and cited this as a reason for greater access to police records. If there were no underlying charge, he wondered, how then could the suspect have "resisted arrest"? These remarks reflect a fundamental misunderstanding of the law and criminal justice system.[2]

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[1] There are many other important legal issues, too numerous to discuss here, raised by the proposed ordinance. For example, the ordinance may violate the official information privilege contained in Evidence Code Section 1040. Requiring the police department to release its records concerning juveniles charged as adults may violate Welfare and Institutions Code Section 827 and the holding of *Wescott v. County of Yuba* (1980) 104 Cal.App.3d 103. Because it may be used to create a criminal history (e.g. a request for reports of all arrests of a particular person), it would violate of Penal Code Sections 11107 and 13330 et seq., as well as the decision in *County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App. 4th 588, which prohibits unauthorized persons from compiling a criminal history of another. The ordinance conflicts with the Information Practices Act contained in Civil Code Section 1798 et. seq.

Additionally, even if the proposal were permissible, we would have numerous drafting suggestions beyond the scope of this letter. For example, the proposed ordinance provides greater exemptions for domestic violence offenses than it does for sexual assault offenses. Domestic violence supplemental reports are exempted, but not initial police reports of domestic violence. Moreover, there is no privacy exemption or provision for excluding information after applying a balancing test.

[2] Investigatory files are not routinely introduced into evidence at criminal trials. Specific items of evidence contained in the files may be introduced if relevant and admissible, but only after the admission has been litigated and ruled upon by a judge. Also, Labor Code Section 432.7 prohibits an employer from seeking out arrest records not resulting in a conviction from any source whatsoever. Presumably the employee in this example was not convicted, since the information then already would have been public. We are at a loss to understand the basis of the remark that the subcommittee's proposal was "more cautious" than other ordinances, since the proposed ordinance provides for greater release of records with fewer protections than the statutes we have analyzed. Finally, the crime colloquially referred to as "resisting arrest" is a violation of Penal Code section 148 which prohibits the willful resisting, ***delaying or obstructing*** of a police officer discharging his or her duties. In cases where the law was violated by delaying or obstructing an officer, there often may not be an arrest on an underlying charge.

Similarly, a September 5, 2007 subcommittee memorandum to the SRTF reflects a misunderstanding of the current California Public Records Act ("CPRA"). In this memo, the task force was provided a copy of the CPRA, with interlineated and deleted provisions that provide broad access to certain crime victims and others of substantial information. The subcommittee chair incorrectly told the task force that these provisions apply only to insurance agents, and thus created the false impression that the current law provides less access to police records than it does.[3] In fact, the portion of the CPRA deleted by the chair gives victims, victims' representatives and others suffering bodily injury or property damage as a result of many enumerated crimes, access to information including the names and addresses of persons involved in, or witnesses other than confidential informants, to the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, and the statements of all witnesses, other than confidential informants.

The SRTF also apparently relied upon misinformation concerning practices in other states. In an editorial published on September 20, 2007, the Mercury News discussed Chief Davis' concerns that public access to police reports could endanger witnesses, help criminals avoid arrest and increase crime. "Pretty scary stuff---until you realize that most of the disclosure rules proposed by the San Jose's Sunshine Reform Task Force are already followed in most large California cities and are the law in 30 states, including that well-known criminal-coddler Texas," the Mercury News editors wrote. Further, in a memo by James Chadwick to the SRTF, he claimed that "[M]ore than 30 states around the country take a different approach. 32 states routinely make police 'blotters' (recording basic information regarding arrests) and/or arrest reports available to the public." In fact, "blotter" information is required to be released in California under the CPRA. By suggesting that 30 states take a "different approach," Mr. Chadwick implies that CPRA does not require the release of this basic information, or perhaps, that police reports are widely released throughout the country.[4] Further, he attached three police reports to his memo which he states are examples of those "routinely released in other states." He argues that "such a widespread practice would have been modified long ago if it caused any serious impairment of public safety."[5]

The District Attorney's Office questions the claim that more than thirty other states and most major cities in California routinely release police reports.[6] The following is just a sampling of states cited by Mr. Chadwick as providing broad access to police reports, when in fact, they do not. There are many other examples. If the SRTF's proposal is

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[3] Bert Robinson's 9-5-07 Memo to SRTF regarding "California Public Records Act 6254f."

[4] Indeed, authority cited by Mr. Chadwick to support his position states that police blotters disclosing the information in the CPRA are public in California. *See* The Reporters' Committee for Freedom of the Press, Open Government Guide 2007.

[5] Chadwick Memo to SRTF, September 20, 2007.

[6] We have inquired at length about the basis for these claims from Bert Robinson, who directed us to James Chadwick and Barbara Marshman, both of whom did not return our telephone calls. Ed Davis also did not know the basis for the claims.

based in part on the belief that most other states are already doing what the SRTF has proposed, we would encourage that a closer look be taken.

Alaska's code mirrors the federal Freedom of Information Act (FOIA), which sharply limits public access to police records, and contains some additional exemptions not contained in California's Public Records Act (CPRA).

Arkansas law exempts ongoing investigations (regardless of whether disclosure would compromise the investigations), as well as the identities of undercover officers, and other exemptions not contained in the SRTF's proposal.

Similarly, in Colorado, public access is completely within the discretion of the police agency, which may release records only if it is not "contrary to the public interest" or if disclosure would not impair or impede an investigation.

Unlike the SRTF proposal, active investigations are not public in Massachusetts, and closed investigations are only public if disclosure would not "probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest."[7] Police techniques, confessions, informants and matters that would invade personal privacy are never disclosed.

In Nebraska, a state more restrictive than California concerning police records, "records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training" are exempt from disclosure.

In Texas, "all information" held by law enforcement would not become public if it would interfere with the detection, investigation or prosecution of crime. No police report becomes public until the subject has been convicted or a deferred entry of judgment has been entered, even if the investigation has been closed. The Texas statute also has provisions for protection of crime victims and others. We note that the Texas report provided by Mr. Chadwick is a computer summary of the basic information concerning the crime, just as such basic information is available in California. It is not an actual police report.

Our research revealed similar restrictions on releasing reports in cities in California. In San Francisco, police records do not become public until the statute of limitations has run or the case has been rejected by the District Attorney. Disclosure of the report may be denied based on the application of a balancing test; that is, if the public interest in nondisclosure outweighs the public interest in disclosure. The SRTF proposal, on the other hand, would allow immediate disclosure of reports, often even before the District Attorney has reviewed the case to determine if charges will be filed. Indeed, the public

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[7] Massachusetts G.L. c. 4, § 7, cl. 26(f).

records subcommittee voted to reject applying a balancing test to police records because they thought the police would abuse the exemption.

Oakland's ordinance is similar to San Francisco. Oakland follows the California Public Record Act rules until the statute of limitation runs or a decision that charges will not be filed. Records then become public to the extent allowed by law. A balancing test applies. Contra Costa County follows these same rules. So does Benicia. Milpitas' ordinance makes no police record public, unless the CPRA so provides. As far as we can tell, **no California city follows the same rules of disclosure---or anything close to it---as recommended by the SRTF.** While the SRTF may make whatever recommendations it chooses, it should not operate under the mistaken belief that its proposals are in practice in other jurisdictions.

As the above discussion reflects, the extent to which records are public in other states depends on what each state legislature, rather than a local government, has enacted. In California, the Legislature sought to strike a careful balance between the public's right of access to information, individuals' right to privacy, and the government's need to perform its assigned functions, such as the investigation and prosecution of crime. (*See e.g.* Gov. Code, § 6250.) We now turn to important reasons that a municipality may not enact legislation such as that proposed by the SRTF.

THE PROPOSED ORDINANCE VIOLATES THE PREEMPTION AND HOME RULE DOCTRINES

We believe that the proposed ordinance violates two important constitutional principles. First, municipalities may not legislate in areas that have been preempted by state law. Second, the California Constitution permits charter cities to regulate only those matters of local concerns. (Cal. Const. Article 11, Section 5(a)). In other words, the city of San Jose may not contradict California law in a matter that is of statewide concern. As discussed below, investigations and prosecution of violations of the California Penal Code are matters of state concern.

Rivero v. Superior Court (1997) 54 Cal.App.4th 1048, 1059 illustrates our concern. *Rivero* involved a conflict between San Francisco's sunshine ordinance and state law. There, the San Francisco District Attorney's Office investigated a claim of wrongdoing by a local official, but concluded that there was a "lack of evidence of any criminal wrongdoing." Francisco Rivero, a former police officer who had initiated the investigation, then made a request under the sunshine ordinance and CPRA for the complete investigative file. The District Attorney refused to produce it on the grounds the file was exempt from disclosure.

The court of appeal noted that under the CPRA, the file was clearly exempt. However, under the sunshine ordinance, disclosure of the file was required. The ordinance clearly applied to the District Attorney and since prosecution had been rejected, would be available to the public pursuant to the terms of the ordinance. While the trial court

denied access to the files because the District Attorney was a state actor over which a city had no control, the court of appeal explained that whether the District Attorney was determined to be a state or local actor was not the point. Investigation and prosecution of violations of state criminal laws are matters of state concern, and a local jurisdiction cannot enact conflicting local ordinances:

> Whether to describe the district attorney as a state actor or a local actor and whether to characterize the district attorney's closed files as state records or local records beg the central question before us. The more fundamental and dispositive legal question is one of first impression. Does compelled disclosure of closed criminal investigation files obstruct the investigatory function of the district attorney's office, thus contravening section 25303? We conclude it does. *Id.* at 1058.

Thus, the city may not contradict state law if it involves an area of statewide concern even though the legislation addresses conduct of a municipal agency, such as San Jose Police Department (SJPD).

But are investigations of SJPD matters of statewide concern, as are investigations of the District Attorney? The court in *Rivero* answered this question clearly:

> San Francisco is autonomous with respect to all municipal affairs. As to matters of statewide concern, however, it is subject to overriding general state laws. (*Bishop* v. *City of San Jose*, *supra*, 1 Cal.3d at pp. 61-63.) **Investigation and prosecution of state criminal law are statewide concerns, not municipal affairs.** (See *In re Lane* (1962) 58 Cal.2d 99, 106, 111-112 (conc. opn. of Gibson, J.).) **Conflicting local ordinances**, such as San Francisco Administrative Code section 67.24, subdivision (d), **must yield.** (Emphasis added.) *Id.*at 1058.

It is inconsistent to argue that an investigation of violation of state law is of statewide concern when conducted by the District Attorney, but of local concern when conducted by the police department. The District Attorney prosecutes all violations of the Penal Code, whether investigated by the San Jose Police Department, any other city police department or our office. Clearly, San Jose may not enact conflicting legislation if to do so would obstruct the prosecutorial function of the District Attorney's office.[8]

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[8] In its September 4, 2007 Recommendations to the SRTF, the Public Records Subcommittee implicitly acknowledges that the city of San Jose is preempted by state law from modifying what that law defines as exempt in reference to protecting the name of a victim of sexual assault, domestic violence crime or a hate crime. The Subcommittee wrote: "Nothing in our recommendations affects the status of that information, *nor do we have the power to do so*." (Emphasis added.)
Further, in reference to police personnel information, the Subcommittee noted that "California law includes strong requirements making most police personnel information confidential…While the subcommittee and the task force heard recommendations that the city of San Jose should make this information public, *the city does not have the power to do so*." (Emphasis added.) However, when essentially eliminating the protections of Government Code section 6254(f) by *requiring* the disclosure of police reports and investigatory files, the subcommittee fails to acknowledge those same limitations on the power of the city.

But does Government Code Section 6253(e), which allows local agencies to allow greater access to records than set forth in CPRA, permit the SRTF's proposal? Again, the court in *Rivero* spoke clearly:

> Section 6253.1 [now 6253(e)], which allows local agencies to permit greater access to records than offered by the CPRA, does not compel a different conclusion. It does not authorize a local board of supervisors to violate section 23503. Similarly, the fact that Smith could voluntarily disclose records of his investigations (see *Berkeley Police Assn.* v. *City of Berkeley* (1977) 76 Cal.App.3d 931, 941-942) does not mean that the board of supervisors may compel him to do so. *Id.* at 1059-60. (Bracketed portion added.)

To summarize, *Rivero* held: "Investigation and prosecution of state criminal laws are statewide concerns, not municipal affairs. (citations omitted.) Conflicting local ordinances. . . must yield." *Id.* at 1059.

THE PROPOSED ORDINANCE VIOLATES PRIVACY RIGHTS GUARANTEED BY THE CALIFORNIA CONSTITUTION

In enacting the CPRA, the California Legislature was careful to balance the public's right to access information against an individual's privacy right. (*See e.g.* Gov. Code, § 6250.) However, the SRTF's police records proposal makes no attempt to protect personal privacy rights guaranteed by the California Constitution. Indeed, the subcommittee expressly declined to include a police records privacy exemption, even though proponents of public access to police reports warned against this approach.[9]

Article I, Section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and **privacy**. (Emphasis added.)

Indeed, in 2004, the California Legislature amended the Constitution to clarify the importance of access to public records, but ratified laws that restricted access to police records, such as the CPRA, which was enacted in 1968:

Article I, Section 3 (b)(1) & (5) provide:

> (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

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[9] *See e.g.* Mark Schlossberg's letter to the SRTF dated October 30, 2007.

> (5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

The principle that dissemination of arrest or police reports of others violates the right to privacy is self-evident and has been so often judicially discussed, that we review only a few such cases here. For example, in *Craig v. Municipal Court* (1979) 100 Cal.App.3d 69, a defendant charged with resisting arrest and battery upon officers sought production of the names and addresses of all persons arrested by the officers for similar charges during the preceding two years. The court ruled that release of such information would violate the constitutional privacy rights of those arrested individuals. The court observed that in the case of such police records, "the relationship between the custodian of records and the person who is the subject of the record is analogous to that of attorney-client." *Id.* at 77. The court further ruled:

> It is an understatement to say that the retention and dissemination of arrest records has been the subject of intensive study by the legislative and executive branches of government as well as private organizations for many years. . . . . In *Loder* (*Loder v. Municipal Court* (1976) 17 Cal.3d 859), our Supreme Court held that *retention* by a police agency of an arrest record of a person against whom no prosecution has been instituted, did not violate the constitutional right to privacy. The essential basis for the holding was that **California had developed a detailed statutory scheme for limiting access to and disclosure of such records and that scheme serves as a safeguard against improper dissemination and use of the records. The corollary of the holding is that the person who is the subject of such records does have an enforceable right of privacy in compelling strict compliance with that statutory scheme.** *Id.* at 78. (Emphasis added.)

It is this statutory scheme, designed to protect individual privacy, that the SRTF's proposal ignores. For example, court records of defendants found factually innocent and drug users who have completed a diversion program are sealed, but these reports would remain accessible under the proposed ordinance. To give the SRTF an idea of how many statutes in California contain provisions designed to protect privacy, please see Appendix A, attached. That document, 39 pages in length, is the text of Government Code Section 6254(k) and 6275 et. seq., enacted by the California Legislature to assist state and local agencies in identifying the many exemptions to the CPRA.

Further, in *People v. Jackson* (2003) 110 Cal.App. 4th 280, the defendant, charged with burglary and sexual assault, sought discovery of police files of two specific similar incidents so that he might prove that another person committed the crimes of which he was convicted. The court ruled: "Ongoing investigations fall under the privilege for official information. (Evid. Code Sect. 1040.) **Moreover, the victims have a**

constitutional right of privacy. (Cal. Const., art. I, sect.1). Both of these factors weigh heavily against a criminal defendant's right to potentially exculpatory material." *Id.*

Similarly, in *Central Valley Chapter of 7th Step Foundation, Inc. v, Younger* (1979) 75 Cal.App.3d 212, the court ruled that arrested persons had constitutional privacy rights in protecting disclosure of arrest information. The appellants presented the court with important public policy reasons that dissemination of arrest information hurts the individual:

> Appellants allege that there are over 400,000 members of their class in California who face severe problems in seeking employment because of widespread discrimination against "ex-offenders and individuals with arrest records in obtaining employment." It is also alleged that the rate of arrests or detentions not resulting in convictions for black persons and for poor persons exceeds the rate of such arrests or detentions for Caucasian persons and for (those living above the poverty threshold, and are subjected to) . . . "damage to their reputations, stigmatized, and exposed to unnecessary and unjustified public embarrassment and humiliation". . . . *Id.* at 221.

Despite this clear language, the SRTF's proposal violates the privacy protections built into myriad statutes, including Government Code Section 6254(f) and other statutes cited in Appendix A. Indeed, the proposal requires that names and identifying information of persons subjected to use of force by SJPD be available to the public when no arrest occurred, in direct contravention of the ruling of the court in *Craig* above.

The solution of simple redactions provided by the proposed ordinance falls short of protecting individual privacy. Redaction often does not protect privacy. For example, suppose someone requested any police report about his neighbor. If the neighbor had never been arrested or charged for the incident, the police would be required to redact the neighbor's name, but the requestor would certainly know that the reports concerned his neighbor. Or if the requestor asked for all reports concerning a known person's address, redaction would do little to protect the privacy of the subject of the investigation.

Also, requiring that the police not release records if doing so would violate other laws is unworkable. This would require police to know literally hundreds of statutes and judicial decisional laws. Further, even if the police somehow ascertained that the requestor would use the records for an illegal purpose, such as to compile a criminal history or for prohibited employment purposes, the ordinance provides no mechanism for denial of an illegal request. Finally, as discussed above, many court records, including police reports, become sealed to further important public policy. But the ordinance does not allow police to deny requests where the records have been sealed by the court. Even if it did, how could the police, as a practical matter, learn of such court action?

THE PROPOSED ORDINANCE VIOLATES PUBLIC POLICY

From the outset, the District Attorney's Office has voiced clear objections to the proposed ordinance because our ability to prosecute crime will be adversely affected. We will lose cooperation of some victims and witnesses. Other cases will be harder, or sometimes impossible, to prosecute because we often must prove in court that a witness or defendant knew critical information that was not available to the public. Some victims, deterred by the prospect of public censure or embarrassment, will not report their victimization at all. Some criminals will use easy access to police reports as a way to become better at committing crime or avoiding detection. While proponents of the SRTF proposal have minimized or disregarded these concerns, the courts recognize these dangers as axiomatic. In *Rivero, supra,* at 1058, the court observed:

> Very few activities performed by public officials are more important to the public and to the individuals most directly involved than the full and proper investigation of criminal complaints. Every effort must be made to ensure that investigators can gather all evidence that is available and legally obtainable. Without the assurance of continuing confidentiality, potential witnesses could easily be dissuaded from coming forward. Even if they knew that sensitive information would not automatically be turned over, publicity-shy witnesses would still have reason to be wary.
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> It is not a complete answer that publicity-shy witnesses may already be deterred from coming forward by the prospect of being subpoenaed for a criminal trial. Sometimes anonymous sources, well known to the targets of investigations, provide important information. That information, though not usable itself, may help focus the inquiry and lead to the acquisition of admissible evidence. These sources' anonymity would be compromised and their willingness to provide information hindered if the subjects could easily review investigation files.

Similarly, in *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759, the court discussed the dangers of a suspect gaining access to police records. The records were sought in a defamation case brought by a mother of a murdered child who had been considered a suspect by police. The court observed:

> For its part, the County paints a compelling picture of the dire consequences that could result from the disclosure of the contents of an investigative file to the suspects in a possible murder. The County invokes the powerful public interest in solving homicides and bringing killers to justice. Undoubtedly that interest is at risk if confidential information about the homicide investigation is released to suspects. There is an obvious danger that they may learn crucial information that would enable them to avoid apprehension. More specifically, permitting suspects to review materials in an investigative file "will enable them to

invent stories, explain away evidence thus far gathered and intimidate or otherwise influence potential witnesses. *Id.* at 265.

Obviously, these issues are not restricted to murder cases. Indeed, there are many examples of cases which would not have been solved had any aspect of police records been made available to the public.

In *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, in declining release of investigatory records concerning police misconduct, the court observed: "Public policy supports our conclusions. Police investigations contain a vast amount of raw or half-baked data, gleaned from witnesses of varying degrees of reliability, veracity and bias. Much of it is hard to digest, and could prove ruinous to personal reputations, careers, or relationships if released to the general public in unvarnished form."

UNDER CALIFORNIA LAW, THERE IS NO DIFFERENCE BETWEEN ACCESS TO POLICE REPORTS AND INVESTIGATIVE RECORDS

Ed Davis has asked that we address whether our legal analysis above is different for police reports than for investigative records.

Under the CPRA, there is no difference between a police report and any record of an investigation by a police department. Government Code Section 6254(f) provides an exemption (with exceptions) for "records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, . . . any local police agency. . . ." Thus, records of complaints, preliminary investigations and full-scale investigations are investigatory records and are exempt. Further, records that are not inherently investigatory may be exempt where they pertain to an enforcement proceeding that has become "concrete and definite." *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1068-1072.

By contrast, the SRTF proposal offers significantly different rules for "police reports" than for "investigatory records." While police reports are defined in the proposal, it is unclear what constitutes "investigatory records." Presumably, the task force means to include anything at all contained in an investigative file. The proposed ordinance exempts investigatory records until law enforcement has closed the case, the statute of limitations has expired, or a defendant has been acquitted or convicted. Additionally, the ordinance offers a privacy exemption for investigative records, but not for police reports.[10]

The distinctions offered by the SRTF for the treatment of police reports and investigatory files may often lead to inconsistent conclusions. This is especially problematic where

[10] There are other differences, and other difficulties, with the investigatory records provisions of the proposed ordinance, but we limit our remarks to Mr. Davis' specific questions. We note that all of our analysis applies equally to the police records and investigatory records portions of the proposed ordinance.

aspects of an investigative file are summarized in a police report, as often occurs. For example, portions of a victim's diary may be excerpted in a police report. Also, it is not uncommon for a detective to prepare a report indicating that he sent a sample to the lab for analysis and which includes the lab's findings. Suppose, for example, that in a murder investigation where the victim's spouse is initially suspected, the police request paternity testing on the victim's children. The police later discover that the spouse was not the killer, but the DNA tests reveal that the children have different fathers, a fact previously unknown to this family. Clearly, the children and the spouse have legitimate privacy interests in this information. While the actual lab report discussing the DNA results would be protected on privacy grounds, the police report discussing the lab's conclusions would be available to the public.

Similarly, because of the overlap between the contents of a police report and investigatory files, it is unclear why investigative files would be public only after a case is closed, but police reports are available from the outset, perhaps even before the District Attorney has reviewed the case. Is a suspect less likely to flee the jurisdiction, intimidate a witness or destroy evidence if he only has access to the police report, but not the investigatory file? Is it any less prejudicial to a defendant's trial if the newspaper prints the defendant's confession, as set forth in a transcript or summary included in the police report, but does not have access to the actual tape of his statement?

Thus, access to police reports and investigative files should be subject to the same protections, as the California Legislature recognized in enacting the CPRA. However, disclosure of the content of investigative files sometimes can be even more damaging. We invite the task force to review Captain Kirby's list of items that may be contained in an investigative file, and consider what legitimate public interest is served by release of many of those items. For example, would the task force support the release of a videotape recording of a child molest victim describing the violations, even if edited to remove the face of the victim? Would that cause harm if posted on a website of a group which advocates sex between adults and children or if broadcast on tabloid television? What public interest would be served by the release of gruesome crime scene photos of a murder victim who had no family to assert a privacy claim? With gang violence on the rise, does it serve a public interest to release gang membership information and photos to anyone who asks, even if it will not compromise any particular investigation, betray a confidential police technique or compromise the safety of a particular person involved in an investigation?

CONCLUSION

The District Attorney's Office urges the SRTF to reconsider its proposal concerning police records. We suggest that instead of proposing that all police records are public, subject to limited exceptions, the task force analyzes the specific areas in which the public has a legitimate interest in greater access to police records. The task force should then balance that interest against the government's need to perform its functions and

individual privacy. The ordinance proposed should be one that addresses those concerns in a balanced way, in compliance with California law.

Thank you for considering this lengthy material. We would sincerely welcome the opportunity to be a part of future discussions on these very important issues.

Sincerely,

JoAnne McCracken
Supervising Deputy District Attorney